

**Testimony of Dan Keppen  
Executive Director  
Family Farm Alliance**

**Before the  
Endangered Species Act Working Group**

Washington, D.C.  
October 10, 2013

The Honorable “Doc” Hastings  
The Honorable Cynthia Lummis  
Endangered Species Act Working Group  
1522 Longworth House Office Building  
Washington, DC 20515

Dear Representatives Hastings and Lummis:

Thank you for this opportunity to submit this testimony and appear before the Endangered Species Act (ESA) Working Group. My name is Dan Keppen, and I serve as the executive director of the Family Farm Alliance. The Alliance advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. The Alliance is focused on one mission – To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

Members of the Family Farm Alliance were pleased to see your leadership in establishing the Working Group. The timing is critical to set up a forum that will invite discussion and input on ways in which the ESA (last reauthorized in 1988) may be working well, how it can be updated, and how to boost its effectiveness for both people and species. As we discuss these matters here today, farmers and ranchers from California’s San Joaquin Valley are seriously worried about their future. The current implementation of the ESA has redirected once-reliable water supplies to the apparent needs of fish protected by the ESA. The loss of that water and resulting loss of productive farm land is already chipping away at rural communities on the west side of the Valley - schools are closing, vendors are going broke, and families and friends are fighting as the law creates “haves” and “have nots”. Next year, those communities could be permanently crippled if the current ESA-driven management style in the California Bay-Delta does not change in a way that injects common-sense discretion and balance into the decision-making process.

The Family Farm Alliance has long worked with federal agencies, others in the regulated community, the House Natural Resources Committee and the Congress to focus attention on the impact of ESA-related litigation and the subsequent listing settlement agreements that result. Our members are greatly concerned that hundreds of ESA lawsuits have been filed over the past five years and that tens of millions of dollars have been awarded in taxpayer funded attorneys’ fees to organizations whose primary interest may or may not be species protection. This takes time and resources away from real species recovery efforts. One of our biggest concerns is that the current Administration will be making listing decisions on nearly 800 species by 2016, including 160 this year, as a result of litigation settlement agreements that appear to have been negotiated with litigious environmental groups behind closed doors.

We support improvements to the ESA - but, that is way easier said than done. Many of us involved in Western water have long pointed to the need for the ESA to be modernized and

applied in a way that fosters collaboration and efficiency of program delivery, in an incentive-driven manner.

However, getting Congressional approval and the needed concurrence from the President of the United States to improve the ESA in a timely way is another challenge altogether. In 2011, a study was commissioned by the Endangered Species Coalition and conducted by Harris Interactive. Overall, the Harris poll showed strong American support (84% for the ESA) and 90% of those polled believed the ESA has helped hundreds of species recover from the brink of extinction. This is what the American public and many of their elected officials believe. That sentiment makes it very difficult for Congress to make even modest changes to this law, particularly when these same litigious environmental groups will vilify anyone who dare try to update and improve the act. Even though the ESA has just a one percent success rate when it comes to actually recovering species.

So - the deliberate, thoughtful approach that your Working Group is taking on this matter is encouraging and we believe the right way to go. Over half of the Working Group representatives hail from the West, the area where rural communities likely suffer the most from ESA-driven litigation. However, involving representatives from Eastern and Midwestern states will provide for increased awareness and better education to parts of the country where residents likely share many of the sentiments expressed in the Harris Poll.

We know the ESA can play an important role in species protection, but it can only successfully do so with input, cooperation and new outside-the-box thinking. Any updates to the ESA must help recover and seek to remove species from the list and encourage public engagement. Additionally, private landowners should be viewed as potential partners in recovery, not enemies. The ESA in its current form discourages this sort of an approach. This testimony has been prepared on behalf of the Family Farm Alliance to help address the questions your Working Group seeks to answer.

### **How is ESA success defined? Is the ESA working to achieve its goals?**

The purposes of the ESA, as originally crafted, were to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such endangered species and threatened species. "Success" of the ESA is not explicitly defined or envisioned in the 1973 Act. However, it is logical to assume that success would best be measured in terms of how many endangered and threatened species protected by the ESA have actually been conserved, or recovered, since the ESA became law. The number of species that have actually been "de-listed" would appear to be a reasonable indicator of the success of the ESA.

Since 1973, more than 1,400 species have been listed as threatened or endangered under the ESA. Only 25 of these species have actually recovered, and only 20 have actually been delisted. Over the same time period, 35 have been found to be extinct. That means just 1.4 percent of the

species protected by the ESA have actually recovered to point that they have been delisted. Using the approach outlined above, by anyone's estimation, it would appear that the Endangered Species Act success rate is abysmal. Clearly, the ESA is not working to achieve its intended goals.

## **How do we measure ESA progress?**

The ESA was a well-intended and laudable effort by Congress and then-President Richard Nixon to protect "charismatic mega fauna" like grizzly bears, the bald eagle, and the blue whale. The original intent of the ESA - stated in the Act itself - was to encourage "the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards". Of special importance to the Family Farm Alliance is that the ESA explicitly declared that it was the policy of Congress that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."

The authors of the ESA clearly believed in applying the ESA in a way that would foster collaboration and efficiency of program delivery, in an incentive-driven manner. Unfortunately, implementation of the ESA has "progressed" in recent years towards an approach that is now driven by litigation and sometimes inappropriate interpretation by federal agencies. Rural communities in areas represented by my organization have suffered, as a result. And now, these same communities face the dire prospects of a nearly 20% increase in the number of species listings expected between 2011-2016 due to recent closed door listing settlements between the U.S. Fish and Wildlife Service (USFWS) and environmental groups.

As far as the Act itself is concerned, little to no "progress" has occurred to keep this 40-year old law in lock-step with the modern era. The ESA has not been substantially updated since 1988. After enactment, Congress revisited and reauthorized the ESA on a five-year cycle with amendments in 1978, 1982 and 1988. Since 1988, the only amendments to the ESA were related to the application of the Act to Department of Defense lands. Authorization for funding of the ESA expired on October 1, 1992. Annually, Congress has appropriated funds to allow for continued implementation of the Act. (NESARC, 2013).

Finding ways to incentivize landowners to make the ESA work is far preferable than what we have been seeing in recent years, where the ESA has been used by special interest environmental groups and federal agencies in court as a means of "protecting" only a single species (such as the Delta smelt, in California) without regard for other impacts, including those on other non-listed species.

## **Is species recovery effectively prioritized and efficient?**

I defer to the federal agencies to fully respond to this question. But, as a close observer of these matters, it would appear that the agencies charged with implementing the ESA - USFWS and the

National Marine Fisheries Service (NMFS) being the key agencies in the region my organization represents - face an insurmountable challenge in even putting together plans that would lead to a priority-based, efficient recovery of imperiled species. How can they, when they are besieged by non-stop petitions to list new species, challenged on decisions to not list those new species, and forced to spend taxpayer dollars to defend against litigation driven under the auspices of the ESA? How many “recovery plans” have actually been written and implemented for the species “protected” by the ESA? And who can blame the agencies, when so much of their time and resources are dedicated to litigious court battles, and the behind-the-scenes “settlement agreements” being cut with the activist groups who are suing them?

There is also a “ripple effect” here that extends beyond the federal agencies. The federal government regularly hands down unfunded mandates on endangered species management that the state wildlife agencies then have to try to implement. These mandates affect the management of other species within the state, which may endanger them in the future. It also strains the budgets of these agencies. (Lally, 2013).

These unfunded mandates are negatively affecting state wildlife agencies, which need to make up the money spent to implement these mandates. This can result in increases in license fees to make up the shortfall, which can result in restricting the legal historic activities that can take place on private property by increasing the costs associated with those activities.

### **Does the ESA ensure the compatibility of property and water rights and species protection?**

The simple answer to this question is an emphatic “no”.

I have witnessed first-hand the on-the-ground impacts of the ESA to farmers and farm families. I moved to the Klamath Basin in 2001, a nearly 16,000 square-mile region comprising parts of southern Oregon and northern California which, under the oversight of the U.S. Bureau of Reclamation (Reclamation), provides water to about 240,000 acres of irrigable crop lands. I served as the executive director for the Klamath Water Users Association (KWUA) starting that year. As several of you may recall, 2001 was the year that the federal government announced that, for the first time in 95 years, no water would be provided for Klamath Project irrigators from Upper Klamath Lake or the Klamath River. Instead, that water was wholly reallocated to meet the alleged needs of three fish species protected by the ESA.

During my tenure with KWUA, I represented rural farmers and ranchers in communities whose very existence relies upon the certainty of the water supply developed over 100 years ago for the purposes of irrigation. I also directly witnessed the stress and anxiety that rural families faced in 2001 and the troubling years since, the drain on their finances, and the toll on their health. These farmers – my neighbors and my friends – were impacted in almost unimaginable ways when their water supplies were curtailed in 2001. Those impacts continue to linger.

The types of economic, human, and environmental suffering caused by the 2001 Klamath Project Operations Plan were catastrophic and well-documented. Hundreds of farm and ranch families without income experienced hardship trying to support themselves and their families. Their ability to pay bills and service debt was severely impaired. Contracts from regional and national food processors were cancelled, some never to be renewed. Similar types of impacts were felt by farm employees, and the owners and employees of the agriculture-related businesses. The demand for social services increased. Some people simply moved out. City parks, schoolyards, and cemeteries withered without water. Farm fields became fields of weeds and dust. Unrelenting wind-borne soil erosion occurred, impairing land productivity and causing air pollution.

Irrigated farmland provides tremendous food and habitat for the abundant waterfowl, deer, antelope, frogs and other species. That value was also lost. Tragically, two of the nation's premier national wildlife refuges were left without water for wetlands, food production and waterfowl habitat.

The Klamath Basin water crisis adversely impacted the financial position of the farmers of the basin. This was due to loss of income, loss of opportunity to grow crops in 2001 (a year of relatively high commodity prices), capital expenditures for wells and other adjustments to irrigation systems, producers being forced to farm further from home, cash contributions to fight the water battle, and fewer buyers of commodities (i.e. some potato sheds shutting down after 2001). Farmers also experienced income tax impacts, an inability to establish credit, and were wracked by uncertainty about the future of their farms and their lives.

Similar impacts were felt on an even greater magnitude by irrigators and communities in the San Joaquin Valley in 2009, when Bay-Delta water was deemed to be more important to ESA-protected smelt than to farmers and ranchers on the west side of the Valley. In both the Klamath and San Joaquin Valley instances, tremendous impacts were felt by landowners, water users, their local communities, other species and the environment, while benefits to the "listed" species of concern were questionable at best, or even unknown.

The Fifth Amendment of the U.S. Constitution proscribes the taking of private property "for public use, without just compensation." In cases where the federal government, by means of any of its various agencies, takes property in violation of the Fifth Amendment—an action known as "inverse condemnation" or "taking"—property owners have a right to seek just compensation via a takings claim filed in the U.S. Court of Federal Claims. And in the West, the state-based right to the use of water for beneficial uses is considered property.

On February 18, 2011, a major victory was won by my neighbors in the Klamath Basin. The long-running case, *Klamath Irrigation District v. United States*, stems from the aforementioned 2001 decision by Reclamation to curtail water to Klamath Project farmers and irrigators that year. Reclamation claimed it was doing so because it was obligated under the ESA to protect endangered species.

The case against the government was filed in the U.S. Court of Federal Claims by several agricultural landowners as well as a number of water, drainage, and irrigation districts on their behalf who alleged, in part, that the government violated the Fifth Amendment by taking their vested rights to water without just compensation. The plaintiffs alternatively sued for breach of their water delivery contracts. (Marzulla, 2011).

The federal appeals court vacated a decision of the trial court – the United States Court of Federal Claims – that had held water users in the Project had no cognizable property interest in water, and therefore had suffered no “takings” when they were denied water in 2001. The federal appeals court remanded the case to the trial court with specific direction concerning the applicable principles to determine whether, by withholding water from the water users in order to supply water to threatened or endangered fish species, the government committed an unconstitutional taking of property without just compensation. The federal appeals court also vacated a separate ruling of the trial court that had held that the United States was not liable for breach of contract, and directed the trial court to reconsider this theory in light of applicable legal standards. The trial court’s decision on remand will determine whether there is liability on either the constitutional or contract-based claims, and will likely be significant in the Klamath Project and other locations where consumptive use of water is subject to curtailment by regulatory restrictions under the ESA or other laws. (Simmons, 2011).

Water use is a critical issue throughout the Western states, especially in areas served by federal water projects like California’s Central Valley or the Klamath Project. Federal involvement has grown exponentially over the past several decades through legislative enactments such as the ESA and the Clean Water Act. The increased control exerted by federal agencies through a variety of means has increasingly led to gridlock in the management of water supplies in the West. Worse – it is crippling Western rural communities supported by agriculture and once-reliable irrigation supplies.

### **Is litigation driving the ESA? Is litigation helpful in meeting ESA goals?**

Litigation and the manner in which certain federal agencies administer the ESA are very much driving the ESA these days, at least in the Western U.S. And this litigation is not helping the agencies recover very many species.

Recent research into litigation associated with federal environmental laws is beginning to uncover some unsettling facts: the federal government appears to be spending about as much money funding environmental lawyers as it does to directly protect endangered species. The Cheyenne, Wyoming-based Budd-Falen Law Offices set out in late 2009 to determine the amount of litigation filed by environmental organizations and the amount of attorneys’ fees these groups have received from the federal government for these cases. The results are shocking, and they only include federal district court cases. I believe this Working Group has received

testimony from Karen Budd-Falen on this matter, and I refer you to her testimony for greater detail on this matter.

Between 2000 and 2009, eight environmental groups - Western Watersheds Project, Forest Guardians (now known as WildEarth Guardians), the Center for Biological Diversity, the Wilderness Society, the Idaho Conservation League, the Oregon Natural Desert Association, the Southern Utah Wilderness Association, and the National Wildlife Federation - filed at least 1596 federal court cases against the federal government. Every one of the groups is a tax exempt, non-profit organization that has been awarded attorney fees from the federal government.....for suing the federal government. These same environmental groups are receiving millions of tax dollars in attorney fees for settling or “winning” cases against the federal government.

Based on the limited information that was available, Budd-Falen found that millions of dollars in total payments were paid in taxpayer dollars from 2003 through July 2007 for attorney fees and costs in cases against the federal government. Determining the total amount of funds awarded to litigants prevailing in litigation proved to be a more difficult task for Budd-Falen. However, just for the six Regions that span the West, they determined that the U.S. Forest Service (USFS) paid over \$1.6 billion in awards to prevailing litigants in 2003-2005. Out of the 44 total cases in which USFS paid prevailing fees during this time, 35 payments went to environmental group plaintiffs.

Funds awarded to the “prevailing” litigants are taken from the “losing” federal agencies’ budget. There is no oversight in spending this money, which could otherwise be funding on- the-ground programs to protect public lands, national forests, ranchers, fish and wildlife and other land uses. Nonprofit, tax exempt groups are making millions of dollars, while ranchers and other citizens are being forced to expend millions of their own money to intervene or participate in these lawsuits to protect their way of life when they have no chance of the same attorney fee recovery if they prevail.

#### Tactics Employed by the “Environmental Litigation Industry”

I have been a keen observer on how certain activist environmental groups use court and media-driven tactics to advance their “missions”. In reality, many of us view this as a very sophisticated way to raise money for their organizations. We term these groups, collectively, as the “environmental litigation industry”. These groups often find a little-known or rarely seen critter or fish (Delta smelt, longfin smelt, lampreys, etc) and prop them up as indicators or surrogated species that prove the surrounding ecosystem is on the brink of ecological collapse.

An alternative and factually compelling scenario is that critters like lampreys and smelt are selected as priorities for these groups because these same critters happen to live in environments directly impacted by resource-based producers. Some believe that the approach used by these litigious groups is intended not so much to help the critters but to find ways to hurt producers

like irrigators (because of ideological opposition to western land use practices) that rely upon the same water bodies to support their existence. It's a simple but very clever approach:

- ☛ Find a little-known species that very few people understand (or care about) that shares habitat with a targeted industry that is frowned upon by certain environmental groups (i.e. off-road recreation, development, logging, farming and ranching);
- ☛ Demonstrate that the species – however unappealing it may be – is actually an “indicator” or surrogate species, and that if it goes extinct, you can be sure that the rest of the ecosystem (with species that appeal more to the general public, like salmon) will do the same;
- ☛ Link the very existence of the species to a simple action associated with the targeted industry;
- ☛ Characterize the targeted industry in as unflattering and inhuman terms (e.g. “corporate farms”, “subsidized agribusiness”, etc.) as possible;
- ☛ Repeat the message in simple terms through a coordinated and sustained media barrage.

Often times, these lawsuits do not even end up in the court room. But - no matter. The media coverage that is generated provides free advertising that undoubtedly contributes to donor support for these now very well-funded organizations. One reason the lawsuits do not end up in the court room is the federal government's alarming tendency to settle with the environmental plaintiffs regardless of the validity of the suit, as discussed further below.

### U.S. Fish and Wildlife Service (USFWS) Settlement

A federal judge in 2011 approved a pair of sweeping settlements that require the federal government to accelerate the consideration of proposed endangered protections for more than 800 animal and plant species. The order by U.S. District Judge Emmet Sullivan means the government must act on hundreds of imperiled species that could generate new additional uncertainty for producers throughout the Western United States. Some decisions could come by the end of the year and others by 2018. The agreement between the USFWS and environmental groups resolves more than a dozen lawsuits that challenged the government's handling of roughly 250 so-called "candidate species." Those are animals and plants that activists say are in dire need of protection but that the government has lacked the resources or the data to address. The agreements also cover more than 600 species for which environmental activists had filed legal petitions seeking protections. The government agreed to address those petitions, as well.

These two settlement agreements are the culmination of what is known as the ESA multidistrict litigation. This case was formed in 2010 by combining 13 federal court cases filed by either the WildEarth Guardians (“WEG”) or the Center for Biological Diversity (“CBD”) –two of the most litigious environmental activist organizations in the West – regarding 113 species. Unfortunately, the predictably enormous costs and potential for other collateral damage that will come from agreeing to these listings are completely unknown. According to recent research conducted by the Budd-Falen law firm, the cost of the settlement agreements to the American taxpayer will be

over \$206 million - just to process the paperwork. That figure does not include the payment of attorney fees to the CBD and WEG.

### Concerns of Western Farmers and Ranchers

The Western producers I represent have seen firsthand the economic impacts that can accompany ESA single species management, and they are very wary and concerned about this massive settlement. Litigation that often surrounds ESA listings and federal agency management decisions adds a whole new level of costs and uncertainty for farmers and ranchers who rely on federal water projects located in areas where ESA-protected fish and wildlife live. With the possible addition of several hundred new species to the ESA list, there are also concerns that other agencies – including the Environmental Protection Agency (EPA) - will be forced to consult with federal wildlife officials over the impacts of its decisions to the newly protected species. EPA could eventually be forced to adopt more stringent pollution control requirements to protect imperiled species once a settlement is reached with USFWS. Finally, given the size of the USFWS budget for this, and the aggressive timeline to review these proposed listings, there is certain to be a great deal of incomplete and otherwise inadequate science going into these listing decisions.

Clearly, certain environmental groups have greatly abused the original intent of environmental statutes in order to find procedural flaws in agency actions, sue the government, and receive millions of federal taxpayer dollars in attorney fees for settling or winning these cases which in turn, allows them to continue litigating against the government. Unfortunately, accurate statistics have not been kept by the Justice Department or the federal agencies, thus there is no accounting for the total amount of tax dollars paid.

### Biased ESA Implementation by Federal Agencies

A growing concern to Western irrigators is the employment of the ESA by the federal agencies as a means of protecting single species by focusing on one narrow stressor to fish: irrigation diversions. For the second time in a decade, Congress in 2010 directed that the National Academy of Sciences (NAS) convene a high-level, independent scientific review of federal restrictions on water deliveries affecting thousands of Western farmers and ranchers. In 2009, those restrictions – based in large part on ESA biological opinions in the California Bay-Delta (Delta) - were a primary cause for the water cutbacks and rationing afflicting hundreds of communities throughout California and the resulting economic devastation in the San Joaquin Valley. South-of-Delta water managers estimate that over 1 million acre-feet of water that would normally be diverted to supply San Joaquin Valley farms and Southern California communities were lost to the Pacific Ocean during a five-month period due to the requirements for Delta pumping restrictions by the biological opinions rendered by federal fisheries agencies to protect endangered fish species.

A similar decision to focus exclusively on one stressor – a federal irrigation project - was made by federal agencies in the Klamath Basin in 2001, and that decision, and the science used by federal fish agencies to support the decision, was criticized later in a review conducted by the NAS.

The California and Klamath stories are very similar. The NAS stepped in after Klamath Irrigation Project supplies from Upper Klamath Lake were cut off by federal biological opinions under the ESA in 2001. The Academies' objective scientific review concluded that there was insufficient evidence to support these biological opinions in restricting agricultural diversions from the Klamath system, which had led to the near-collapse of the local agricultural community. In Klamath, the federal regulators looked at only one of the stressors contributing to the fisheries' decline and they focused on only one solution – cutting off water supplies to agriculture. Not surprisingly, the listed species apparently are no better off today than they were in 2001, yet the agricultural community struggles with operating capital, input suppliers and contracts for products due to the lack of a reliable water supply.

Likewise, in California today, the same federal agencies have refused to assess the impacts of the many stressors affecting the health of the Delta. And for over fifteen years, they have been restricting or cutting off water deliveries, even though their experience during those fifteen years have conclusively demonstrated that these restrictions have done little to prevent the fisheries' decline in the Delta.

As in California, the effects of the Klamath restrictions were immediate and far-reaching– not just losses to the economy but also the wildlife benefits that were lost with the water diversions to farms and ranches (and a federal wildlife refuge). And yet, the federal regulators failed to perform any environmental impact analysis before they ordered cutbacks in California and Klamath.

A key point to note here is that the federal water agencies, like Reclamation, have chosen to “consult” with the USFWS and NMFS on the annual operations of these federally developed water storage and delivery facilities as “discretionary decisions” under the ESA. These water projects were congressionally authorized and state water rights-based projects that were originally designed to deliver irrigation water to private lands – year in and year out, with little change in operation other than for natural drought conditions. The fact that the federal agencies believe they have the “discretion” to deliver water to their contractors borders on arrogance and is unfathomable, at best. Farmers and ranchers invested their hard earned dollars in developing privately held farm property based on the promise and their state water right to use this federally-developed water, and Congress never intended for these projects to deliver water on a discretionary basis.

U.S. District Judge Oliver Wanger recently handed a victory to agricultural water users who were seeking to maintain pumping levels in the Sacramento-San Joaquin Delta. In separate decisions involving threatened delta smelt and endangered salmon, Judge Wanger found that the

federal government must consider humans along with the fish in limiting use of the delta for irrigation. He also found that water users made convincing arguments that the federal government's science didn't prove that increased pumping from the delta imperiled the smelt.

Among the reasoning for the ruling offered by the court:

- The federal agencies failed to undertake any quantitative analysis to determine how many smelt there are;
- As a result, the agencies' claims with respect to the detrimental impact of water pumping on the overall smelt population were not supported;
- The agencies moreover failed to establish the significance of pumping operations on smelt abundance in relation to all of the other factors affecting the smelt; and .
- The court further found that the federal agencies failed to address alternative approaches to avoid jeopardy to the smelt.

Judge Wanger directed the USFWS and the NMFS to revise the biological opinions for smelt and for salmon. He found that the agencies failed to meet the standards for scientific integrity that the ESA requires. And he determined that both agencies violated the National Environmental Policy Act as well. However, current new biological opinions developed in the wake of Judge Wanger's decision clearly still do not take into account the impact of these regulations on the human environment. Regulatory restrictions still hamper the designed intent of the two water systems that serve two-thirds of California's population.

### **Is the Endangered Species Act transparent, and are decisions open to public engagement and input?**

The government needs to improve communication in the ESA consultation process between stakeholders, local entities and federal agency staff administering the ESA. It should also coordinate efforts to avoid duplication of already existing research and information in areas being reviewed. We need to find ways to encourage policy officials to think outside of the box and properly employ the discretion embedded in the ESA. I offer three specific examples to support this observation.

#### 2011 U.S. Fish and Wildlife Service Settlement Agreements

As discussed above, the USFWS in 2011 entered into settlement agreements with the Center for Biological Diversity and WildEarth Guardians. This testimony previously outlines the concerns my membership has regarding this disturbing development. However, some Members of Congress are even more concerned with the lack of transparency and the reasons USFWS entered into these settlements. Since May 2012, Republican Senators on the Environment and Public Works Committee have sent three letters to USFWS, requesting documents and answers to a series of questions about the closed-door settlement agreements to make final ESA listing determinations for more than 250 species over the next six years. USFWS has apparently

claimed it is unable to provide the requested information because the determination for what documents can be provided rests with the Department of Justice.

Many of the more than 250 listings that could occur as a result of these settlements will have a tremendous impact on states and local governments, private property rights, and economic growth. Yet, USFWS chose to make these agreements with two litigious environmental groups without any consultation from Congress or affected stakeholders like state wildlife agencies who are the traditional land managers in states (Vitter, et al 2013). And USFWS has yet to provide a record of the communications between the USFWS and the environmentalist plaintiffs of the settlement agreements.

### 2001-2002 Klamath Irrigation Project Consultation Process

In recent years, primarily due to improved transparency resulting from better relationships developed in long-term settlement discussions, the decision-making process regarding Klamath Project operations has become more collaborative, inclusive and transparent. However, not so long ago, many Klamath Basin fishery science issues, research studies, and management decisions were largely non-peer reviewed and developed in a vacuum. Transparency issues remain a concern with many in the regulated community, in Klamath and elsewhere.

Although the federal fishery agencies claimed to have conducted some form of “internal” peer review of their biological opinions related to Klamath Project operations, they were not performed in a manner conducive to allowing unbiased scientific review. In 2001, only selected individuals were included in the formulation of the two final biological opinions that cut off water to the Klamath Project. Furthermore, only certain information was used by the USFWS and NMFS, and additional relevant, science-based information was either overlooked or ignored. The agencies gave greater weight to theoretical information to support an assumption for high lake levels and high reservoir releases without acknowledging empirical data that did not support their premise (Vogel 2002).

Because of the heated controversy over the federal government’s decision to eliminate water deliveries to the Klamath Project in 2001, the National Academy of Science was asked by the Department of Interior and Department of Commerce to “evaluate the strength of scientific support for the biological assessments and biological opinions on the three listed species, and to identify requirements for recovery of the species” (NRC 2004). Although the NRC Klamath committee agreed with many of the agencies’ decisions, after extensive review, they ultimately concluded that there was insufficient scientific support for the argument of high lake levels for suckers (Upper Klamath Lake) and high Iron Gate Dam releases for coho. Notably, the peer review committee members were unanimous in their conclusions on both biological opinions.

Many of the most pertinent findings, conclusions, and recommendations of the NRC Klamath Committee were not new to the USFWS or NMFS at the time those agencies developed their biological opinions on Klamath Project operations. The NRC final report advocates a watershed

approach, peer review, greater stakeholder involvement, oversight of agency actions, focus on factors other than the Klamath Project operations, reduction of resource conflicts, and incorporation of the principles of adaptive management toward species recovery. Over the previous decade, much of the same and similar technical findings and recommendations were reported to those two agencies, but were mainly ignored. (Vogel 2004).

The NRC committee's reports effectively found no scientific basis for the 2001 cut-off to the Klamath Project. Proponents of the agency decisions (opponents of the Klamath Project) correctly pointed out that the NRC committee did not say the decisions were "wrong" or "arbitrary." And, they said, "Science is uncertain, we all know that: hence, no big deal."

For anyone who endured the consequences of the 2001 decisions, the efforts to minimize the significance of the NRC committee's findings were absurd. In 2001, a desperate community was looked in the eye and told, "Sorry, we know it may hurt, but 'the science' is compelling and requires you to go without water." This was wrong, literally, and as a matter of policy. For whatever reason, the agencies had become too close to, and too much a part of, the side-taking that had come to dominate issues (political and otherwise) surrounding the Klamath Project. For this reason alone, outside review was needed.

There is nothing inherent in peer review that either favors or disfavors economic interests. If the administration of the ESA has reached such a point that oversight is perceived as critical, the act is not working. The Klamath peer review underscores the point. That peer review process not only forced a reconsideration of otherwise-unchecked disastrous decisions, it pointed to a better approach for species recovery. It also hints at something that is often overlooked in the ESA debate, especially by interests outside of rural areas. If protecting a species is important to society as a whole, then all of society - not just select family farms - should bear that burden.

### California's Central Valley Project Operations

The increasingly complex federal regulatory structure, and the increasingly expensive and protracted processes which this structure encourages, makes obtaining and sustaining water supplies increasingly difficult on both agricultural and municipal users alike. For the farmer or rancher, the current water allocation and reallocation schemes often create economic conditions, a sense of disillusionment and resignation, and uncertainty. Nowhere is the uncertainty of water supplies greater than in California's San Joaquin Valley.

Severe water shortages caused by the combination of federal fisheries restrictions and drought on water supplies to the western side of the Valley forced hundreds of thousands of farmland to be fallowed in 2009. University of California experts estimate that the combined effects of these restrictions on the water supply have cost Central Valley agriculture nearly \$1 billion in lost income and more than 20,000 lost jobs. In 2009, water users that depend on the federal Central Valley Project (CVP) received only 10 percent of the water they contracted to receive, the lowest allocation in the history of the project. Without these federal restrictions, the allocation would

have been 30 percent. The U.S. Department of the Interior provided allocation of water for south-of-Delta CVP agricultural water service contractors in 2010 to a whopping 25 percent of their contract. This year, that same allocation was 20 percent of their contract. Next year, even with average hydrologic conditions this winter, those water users face a ZERO allocation, and implementation of the ESA is a primary reason for this grim scenario.

The organization I work for - the Family Farm Alliance—in July 2009 filed a lawsuit in federal district court challenging the science and decision-making used by the federal government to justify taking water away from farmers and letting it flow out through the Golden Gate. The Alliance challenged a “biological opinion” issued by the USFWS, which said a 3-inch fish, called the Delta smelt need that water. This marked the first time since the Alliance was formed over 20 years previous that it had filed a lawsuit, and this action was not taken lightly. In December 2008, attorneys for the Alliance raised concerns with the adequacy of the scientific data used to develop the opinion to the attention of the government, using the federal agency’s own administrative procedures to seek correction of the opinion. The government refused to address the problems that were raised or correct the opinion. The Alliance was forced to file the lawsuit to compel the government to respond.

We wanted the court to order the government to revise the opinion to comply with the fundamental requirements of the ESA and the Information Quality Act (IQA) regarding the quality, objectivity, and integrity of scientific decision-making by federal agencies. Among other reasons, the mandated Independent Peer Review of the smelt biological opinion was not performed properly under the ESA. The biological opinion was based on assumptions and speculation, not actual scientific data. For the previous 15 years, federal regulators had ordered more and more stringent restrictions on the water supplies pumped through the Delta to serve California’s farms and cities. But instead of showing any benefit from these measures, the populations of delta smelt and other fish have continued to decline. There are many reasons for the decline in the fish population that are not related to the water pumping that continue to be ignored by the government, including urban water pollutants, increases in non-native fish that feed on the smelt, and climate changes. Predation of juvenile salmon by other fish species is especially troublesome.

The IQA provides a mechanism for the public to request corrections in documents of this kind, but when the Family Farm Alliance formally asked USFWS to correct 25 specific defects in the biological opinion, the agency first delayed making any response, then rejected our request, and when we appealed, they rewrote all of the issues we raised and instead addressed only the questions they deigned to answer.

In his ruling – issued in October 2010 - Judge Wanger did not question the substance of any of our complaints, but nevertheless ruled that our filing was moot on procedural grounds. He concluded that IQA itself is insufficiently specific with respect to deadlines or the adequacy of an agency’s response to such a request. As for USFWS’ failure to conduct an independent review of the shortcomings in its own scientific analysis, Judge Wanger determined that the

federal government has not established “enforceable standards” to ensure the objectivity and independence of the peer review process.

Although we were disappointed with the outcome, Judge Wanger’s ruling provides a valuable roadmap to the points where improvements are needed at the federal level to ensure that the government’s scientific analysis is competently performed, based on the best available science, independently reviewed, and subject to appropriate public comment and correction.

## **What is the role of state / local government and landowners in recovering species?**

It is clear that the collaborative, incentive-driven approach envisioned by the authors of the ESA has taken a back seat to litigation and the top-down approach employed by some federal agencies charged with ESA implementation. It just doesn’t have to be this way, and opportunities exist for a fundamental paradigm shift that can make the ESA really work.

The role of State and Local Governments (including political subdivisions) can be improved through ESA Section 6 cooperative agreements and other mechanisms under the Act. State and local government management of recovery efforts should be encouraged to ensure local control and participation. The federal government must recognize and promote State and local government efforts that can act as umbrella programs for small landowners.

We support the efforts of a group within the USFWS called “Partners for Fish and Wildlife”, which helps to fund habitat work on private lands. This program already has the infrastructure and relationships with landowners to get effective habitat work done for endangered species. They have projects on the ground all over the country and are doing yeoman’s work to preserve habitat for toads in Nevada, Sage Grouse in Wyoming, and the Mountain Plover in Colorado, to name just a few success stories. The Partners for Fish and Wildlife is uniquely positioned to fulfill the direction of the ESA for the USFWS to manage threatened and endangered species.

The Partners program is successful because it employs experts who are on the ground, working with landowners, instead of crafting mandates via biological opinions from far-removed government offices. These federal officials recognize that if a species exists and thrives on a property—public or private—the practices that currently occur on that property will not harm and could possibly protect that species. So - they learn to recognize, for example, that sage grouse are vulnerable to predators, and that areas where ranchers run sheep tend to have heavy predator control. They take the time to respect the observations of local landowners, who every day see thriving sage grouse populations on their lambing areas. Working with landowners, they gain an understanding and shared belief that the predator control that takes place on private lambing grounds has helped to keep the sage grouse in those areas healthy. (Lally, 2013).

The new, more collaborative (negotiated) approach that is occurring in the Klamath Basin, which is being driven by the region’s diverse stakeholders, gives us a glimpse of what might be

possible if the fear-mongering and litigious approach is abandoned. When landowners, water agencies and local governments are engaged and do not have their very existence threatened, they can and most of the time will, become willing and quite able partners in species recovery.

## **Are changes to the ESA necessary?**

The goals of the Endangered Species Act are laudable. However, this 40-year old law could stand some targeted reforms, including common-sense changes to make it work better, encourage incentive-driven recovery efforts, and discourage litigation. The Family Farm Alliance for decades has worked with our members and leaders to develop specific, practical changes to the ESA that we think will make it work better in the modern era:

- ☛ The Administration should focus on applying the ESA in a way that fosters collaboration and efficiency of program delivery, and is incentive-driven. For example, there is a need to make it easier to provide safe harbor for neighboring landowners. The USFWS does provide safe harbor agreements whereby they agree to inspect private property and establish a baseline of conditions. They allow landowners to work to improve conditions and will provide “take” protection for those activities, including on-going operations. This works for the specific land/facilities that are being improved, but does not address the fact that the improved conditions will now draw more critters to that property and neighboring properties. Programmatic safe harbor (“take” protection) should be provided for anyone conducting normal operations within a certain radius (probably species dependent) of proposed projects. The federal government can also enhance wildlife habitat, species protection and other conservation outcomes through regulatory and voluntary conservation programs by finding ways to streamline the ESA consultation process, which sometimes takes up to a year to initiate. It can establish time limits and force the agencies to comply.
- ☛ Standards for scientific and commercial data that are used to make decisions under the ESA must be established. Relatively greater weight should be given to data that have been field-tested or peer-reviewed. The former requirement would help clarify when such things as “personal observations” or mere folklore are considered by the agencies to be reliable enough to make decisions with potentially profound effects. Peer review of ESA listing decisions and ESA section 7 consultations should be provided by a disinterested panel. Administrative guidelines and/or legislation can be crafted to create procedures for that process. Congress should consider strengthening the Information Quality Act and ensure compliance with the IQA in all ESA decisions. The data requirements for listing petitions and critical habitat designations should be improved, and federal agencies should ensure that all data is made available to the public. The agencies should also review and refine procedures, information requirements and criteria for listing distinct population segments as well as classification of species. Finally, agencies can also provide a “place at the table” for relevant local stakeholders during ESA consultation (also known as “applicant status” for irrigation districts); the U.S. government must encourage regulatory agencies to utilize more senior

policy officials to help solve challenging ESA problems. Irrigation districts should have the ability to meet directly with those upper-level managers.

- ☛ For ESA settlements involving federal environmental agencies, the federal government can provide better oversight and transparency in how attorney fees are awarded and distributed. Measures can be taken to ensure there is complete transparency and reporting on the government's expenditures of taxpayer dollars when attorney fees are awarded. We are pleased to see that there are a number of efforts going on in Congress to find out exactly how much environmental litigation organizations are receiving in legal fees and cost recoveries using taxpayer funds they get as a result of suing the federal government. Only through on-going investigations into legal fees paid to litigious environmental groups will policy makers and the American public know the answer to exactly how much these groups have received, which may provide a further indication of what types of on-the-ground conservation measures could have been funded with taxpayer money diverted towards "settling" law suits. We strongly believe that the 2011 settlements between the USFWS and environmental groups should be withdrawn until the full implications are fully understood and publicly vetted.
- ☛ There needs to be acknowledgement that in order to preserve these endangered or threatened species or preclude listing at all that work needs to be done on the ground immediately, not two or three years from now. Water developments, fence mitigation, sage brush treatments, and fish passages or barriers are all examples of important habitat work that could be done now to preserve endangered species habitat. Simplifying the permitting and regulatory paperwork from dozens of pages to a reasonable length application, allowing ground level managers to make decisions, and increasing the number of technicians on the ground to get the work done would streamline the process and make it easier to get work done in a timely manner. (Lally, 2013).

In all of this, it is essential that the role of science be understood in the context of policy discretion in implementing the ESA. Some will argue that "we must let scientists decide" as choices are made regarding the protection of species. This view ignores the significant complexities which give rise to significant uncertainties as to what is "best" for the species. In the end, all decisions related to implementing the law are choices. Policy choices. Policy choices, to be informed by the "best available" scientific understanding. Policy choices to be made by policy makers at the appropriate level of management within the agency. Without question the policymaker must look to his/her scientists for advice on the possible ecological results of any given decision, but he/she cannot simply ask the scientist what the "right" thing to do is.

The recommendations above are just a sampling of the ideas the Family Farm Alliance and others have long proposed in an effort to bring updates and improvements to the ESA. We believe these recommendations would (1) make it easier for landowners, businesses and other organizations to protect species; (2) respect the needs of private property owners, including

vested state-based water rights; and (3) encourage collaborative conservation that ultimately and equally benefit communities, citizens and species.

## **Conclusion**

The ESA is an outdated law that is clearly not working. I am hopeful that the Working Group will provide an effective platform to coordinate the efforts of a broad-ranging group of elected officials and stakeholders to make the ESA work. It needs to be more about incentives and collaboration and less about litigation and regulation.

I have not seen a comprehensive report that attempts to put a dollar figure on what the actual ESA-related costs have totaled in the past decade in the West, but I am confident that the magnitude of the cost of implementing the Act would be astounding when you consider the loss of farm gate dollars, ripple effects to local communities, diminishment of the tax base, and increased unemployment. The direct result of this will become clear to the consumer of food as prices must rise to keep my members irrigating and in compliance with the ESA and a multitude of other federal mandates. For instance, one of my board members in the San Joaquin Valley has seen his irrigation bill for water jump from \$300 per acre to \$1,800 per acre - for the same permanent cops on his ranch - in just 5 years. This is due to the federal water cutbacks and the need to find supplemental water supplies to make up for his original supply. These costs will have to be passed on, and the consumer at some point will feel the impact.

I close this testimony with a final reference to the dire situation that is facing California's San Joaquin Valley now, and the potential disaster it faces next year. With normal hydrology this winter, and with minimal to moderate water being dedicated to ESA-"protected" fish, water managers are expecting a 0-10% water allocation for 2014 under the existing ESA paradigm that has been imposed on the California Bay-Delta. That translates to 300,000-500,000 acres of prime Central Valley Project irrigated farm land - the fruit and vegetable basket of America - laying fallow next year. Are we so blind that we actually think depression, food shortages, mass unemployment, and true hardship and failure cannot happen again? Maybe we should ask our grandparents and our parents, who had the foresight to build the infrastructure on which our prosperity and our ability to produce food for an exploding global population depends, whether these costs are justified in light of the little benefit derived from the actions that impose them.

Our farmers and ranchers in the San Joaquin Valley are businessmen, and those that grow permanent crops must make 30-year decisions to plan for land use, plantings, debt, and infrastructure in order to help produce food for a global exploding population. The uncertainty to their water supply - in large part caused by litigation and federal implementation of the ESA - makes long-term planning impossible, as they try their best to stay in business.

The water cutbacks that have already occurred are not increasing the populations of salmon and smelt. Further cutbacks will only serve to harm agriculture and other water users. San Joaquin Valley farmers cannot afford any more cutbacks in their water deliveries, which will also add to

unemployment that already has reached Depression-era levels in agricultural towns up and down the Valley.

In the bigger picture, fewer crops coming out of the San Joaquin Valley will increase the need for imported fruits, vegetables, and nuts from other countries. Increased dependence upon imported produce leads to increased vulnerability to food safety problems such as unlicensed pesticides, exotic pests, and diseases, not to mention terrorism. That is because other countries produce food ingredients that are being grown and processed under conditions that would violate our public safety standards in the U.S.

The California legislature has established the Co-equal Goals of enhancing water supplies and reliability while also enhancing and restoring the ecosystems which rely on the waters of the state. This is a simple and common sense statewide policy that would have applicability in all of the 17 Western states. But there is nothing “co-equal” about managing our water resources or even taking action to improve our ecosystems when the federal ESA is in play. Any federal agency decision which may, now or in the future, have any implication or impact on a listed species must find agreement from those people in government who are charged with implementing the ESA. The Act that guides them requires no balancing of interests, no concern for our food supply or food safety, and no consideration of the human impacts of their regulatory decisions. Their powers are near boundless and the judicial system gives their decisions great deference.

I have already discussed the difficulty in amending the ESA. However, I should also point out that there is considerable discretion in HOW the ESA is implemented. Given the significant scientific uncertainty with many of these species and the ecosystems in which they reside and the failure of the ESA regulators to look at the host of stressors affecting them, the agencies need to step back and rethink the consequences of their actions. Even though the ESA does not require the human consequences of their decisions to be considered, it does not prohibit such consideration. Understanding the impacts on people that come with ESA decisions is simply good public policy. To ignore how people are affected is simply bad public policy.

If our national leaders and society at large is unwilling to change the ESA, or be responsible for it's effects (which appear to very negative impacts to the human species, with very little proven improvements for endangered plant and animal species) - then let history be the judge.

Thank you for this opportunity to present this testimony.

## References for this Testimony

I would like to thank Leslie James, Chair of the National Endangered Species Act Reform Coalition (NESARC), for her helpful assistance in developing this testimony. Other references:

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